

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM GEORGE SUTHERLAND,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2007

No. 266204

Calhoun Circuit Court

LC No. 2005-001018-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (person 13 to 15 years of age), and one count of accosting a child for immoral purposes, MCL 750.145a. He was sentenced as an habitual offender, third offense, MCL 769.11, to 20 to 30 years' imprisonment for each of his third-degree criminal sexual conduct convictions, and to 43 to 96 months' imprisonment for his accosting for immoral purposes conviction. Defendant now appeals as of right. We affirm.

Defendant befriended a group of special education high school students and was later accused of paying two of the female students for sex. The students all participated in a program called Student Transition, Reaching Independence, Direction, and Employment (STRIDE) at Battle Creek Central High School, which is an alternative curriculum program for students who are "cognitively mentally impaired." The students generally perform academically at a third or fourth grade level and have a level of mental development of children five or six years younger than their chronological age.

The victim alleged that defendant arranged to have sex for money with her on three occasions when she was fourteen years of age. She testified that a male STRIDE student, Tyray Robinson, telephoned defendant and told him that she was willing to have sex with defendant for money when, in fact, she did not want to do so. Each time, defendant picked her up in his vehicle and drove her to his house. There, he performed various sex acts on her, including sexual intercourse, in exchange for money. The victim shared this money with Robinson.

Defendant argues that the trial court's admission of evidence, pursuant to MRE 803(6), of school attendance records for the victim, Robinson, and another student witness violated MCL 600.2165 and necessarily constituted an abuse of discretion. We conclude that defendant is not

entitled to assert the statutory student-teacher privilege created by MCL 600.2165 and, therefore, has no standing to challenge his conviction on the basis of a violation of the privilege.

We review a trial court's decision whether to admit evidence for an abuse of discretion and will only reverse where there is a clear abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, where, as here, defense counsel raised no objection to the admission of the evidence at the time of trial, this Court's review is limited to whether the admission of the evidence amounted to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence," which this Court reviews de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Whether evidence is barred by a statutory evidentiary privilege is a question of law that this Court reviews de novo. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). Likewise, whether a party has standing is reviewed de novo. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

"Although usually raised in the civil context, the question of standing pertains to criminal matters as well." *People v Yeoman*, 218 Mich App 406, 420; 544 NW2d 577 (1996). A criminal defendant must satisfy the two elements of standing: "first, that [the defendant] will devote himself to the sincere and vigorous advocacy of his position, and second, that [the defendant] has a legally protected interest at stake that differs from the interest of the citizenry at large." *Id.* For example, this Court has held that while a defendant has "an interest like no other" in the administration of his trial, he does not have standing to challenge a decision of the court unless he can satisfy the second prong of the test for standing. *Id.* at 421. Consequently, a criminal defendant lacks standing to challenge his conviction based on violations of a third party's right to claim a testimonial privilege at the defendant's trial. *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994); *People v Gallon*, 121 Mich App 183, 190; 328 NW2d 615 (1982); *People v Poma*, 96 Mich App 726, 730; 294 NW2d 221 (1980); *People v St. Onge*, 63 Mich App 16, 18; 233 NW2d 874 (1975).

Here, MCL 600.2165 creates a testimonial privilege, which like all testimonial privileges may only be asserted by the owner of the privilege or persons "vested with the outside interest or relationship fostered by the particular privilege." McCormick, Evidence (4<sup>th</sup> ed), § 73.1, p 102. MCL 600.2165 provides:

No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcripts thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.

MCL 600.2165 is designed to protect the privacy of students. The students in the instant case did not assert the privilege to prevent their school records from being introduced at defendant's trial, and defendant has no relationship with his victim or the other students that would permit him to assert the privilege on her behalf. Therefore, the trial court did not abuse its discretion by admitting the records.

Defendant's related claim that defense counsel's failure to object to the admission of the school records constituted ineffective assistance of counsel must also fail. Because the challenged evidence was properly admitted, any objection by defense counsel would have been futile. Given that "defense counsel is not required to make a meritless motion or a futile objection," it was objectively reasonable for defense counsel not to object to the admission of the records. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Thus, defendant has not demonstrated that, but for counsel's failure to object, there was a reasonable probability that the outcome of his case would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant's next issue concerns the weight and sufficiency of the evidence supporting his conviction. He contends that the evidence at trial was insufficient to enable a rational jury to conclude that he committed third-degree sexual criminal conduct and that the verdict was against the great weight of the evidence.

In reviewing a sufficiency of the evidence question, we view the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This Court does not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

A trial court may grant a new trial if the verdict is against the great weight of evidence. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). This Court reviews a great weight of the evidence claim "to determine whether the evidence preponderates heavily against the verdict to the extent that it would be a miscarriage of justice to allow the verdict to stand." *People v Melton*, 269 Mich App 542, 546; 711 NW2d 430 (2006), superceded on other grounds 271 Mich App 590; 722 NW2d 698 (2006).

Defendant asserts that the victim's description of the act of oral sexual penetration was insufficient to establish that defendant committed that act as defined by Michigan statute and case law. MCL 750.520a(p) provides that sexual penetration includes "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." "[C]unnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes. Therefore, there is no requirement, if cunnilingus is performed, that there be something additional in the way of penetration for that sexual act to have been performed." *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

When viewed in a light most favorable to the prosecution, the prosecutor presented sufficient evidence that defendant performed cunnilingus on the victim. Cunnilingus does not require an act of penetration. *Harris, supra*. Therefore, it is irrelevant that the victim denied that defendant's tongue entered "inside" or "in between" the "slit" in her vagina. Her testimony that defendant licked her vagina and that his tongue went "in between" is sufficiently detailed to support a reasonable inferences that she was attempting, in an unsophisticated manner befitting her age and cognitive ability, to describe cunnilingus. *Vaughn, supra* at 379-380. Contrary to defendant's contention, it is not necessary for the victim to testify that defendant touched her inside the folds of her labia because *Harris* establishes that oral contact with the "labia itself" is sufficient. *Harris, supra* at 469. Furthermore, we have found testimony that a defendant's mouth touched the part of the victim's body that she uses to go to the bathroom sufficient to support a verdict of first-degree sexual conduct on a child. *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Here, the victim's explanation that defendant's tongue touched her where she wipes after using the bathroom is substantially similar to the victim's testimony in that case. Consequently, the evidence was clearly sufficient to support the conclusion that defendant made oral contact with the victim's external genital organs. *Harris, supra* at 470.

Defendant has also failed to establish that his verdict was against the great weight of the evidence. A trial court may not grant a new trial because it disbelieves the testimony of witnesses for the prevailing party as matters of credibility are the sole province of the jury. *Lemmon, supra* at 636-637. However, "the issue of credibility of the witnesses is implicit in determining great weight or overwhelming weight of that evidence." *Id.* at 638. Therefore, a trial court should exercise its discretion to grant a new trial only in exceptional cases in which a serious miscarriage of justice would otherwise result, such as where the testimony is inherently implausible or defies physical realities. *Id.* at 643-644.

Defendant contends that his case presents an exceptional circumstance because the victim's testimony was so fraught with inconsistencies that it was not only incredible but also objectively unreliable. Based on our review of the record, we conclude that the inconsistencies in the victim's testimony are a matter of detail regarding the specific acts performed on each of three sexual encounters between the victim and defendant and the amount of money he paid her for each encounter. The victim testified consistently that defendant subject her to oral, penile, and digital sexual penetration during at least one of their three encounters. Therefore, this case does not justify an exceptional intrusion upon the jury function of determining witness credibility. *Lemmon, supra* at 643.

Defendant's final claim is that the trial court miscalculated the scoring of four offense variables at the time of sentencing. We agree that the trial court erroneously scored Offense Variable (OV) 4, MCL 777.34, but we find no error in the scoring of OV 10, MCL 777.40; OV 11, MCL 777.41; or OV 14, MCL 777.44. The error does not require resentencing, however.

A sentencing court has discretion when determining the number of points to be scored for the offense variables. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court must affirm the sentencing court's scoring decision if there is any evidence to support the given score. *Id.*

The trial court improperly scored ten points for OV 4, MCL 777.34, because neither the victim nor any other witness testified that the victim suffered a psychological injury. Under

MCL 777.34(1)(a), a score of 10 points is proper when “[s]erious psychological injury requiring professional treatment occurred to a victim.” The victim’s mother testified that her daughter was more disobedient than usual and that she adopted an “I don’t care attitude” during the time frame of the offenses. However, she did not state that this change of attitude followed the offense or that it was caused by defendant’s conduct. The victim did not describe any psychological injury nor did she submit a victim impact statement describing an injury. Therefore, the proper score for this offense variable is zero points under MCL 777.34(1)(b) and not 10 points under MCL 777.34(1)(a). However, this change does not affect defendant’s sentencing range and resentencing is not mandated because defendant’s recalculated total OV score of 125 is within the same guideline’s range within which the defendant was originally sentenced. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

The trial court correctly assessed fifteen points for OV 10, MCL 777.40, because predatory conduct was involved. MCL 777.40(1)(a). Defendant contends that the evidence supported no more than 10 points for OV 10 based on the exploitation of “a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.” MCL 777.40(1)(b). However, we find that defendant’s predatory conduct was established through his preoffense conduct with the victim, which the trial court could have found was for the primary purpose of victimization. MCL 777.40(3)(a). Defendant established a relationship with the victim and her friends, other special education student’s at Battle Creek High School, by offering them rides, fast food, and other desirable items before he committed these crimes. He picked the victim up from her school in the middle of the day and treated her to fast food, marijuana, and alcohol before he had sex with her for the first time. Furthermore, defendant befriended Robinson and used him as his intermediary with female STRIDE students. All of these actions indicate that defendant targeted young, disadvantaged, and cognitively impaired girls. Consequently, there was no error in the trial court’s scoring of OV 10 based on defendant’s predatory conduct. *Hornsby, supra*.

Defendant also asserts that OV 11, MCL 777.41, was improperly scored at 50 points and that the appropriate score was zero. MCL 777.41 provides that 50 points should be scored if two or more criminal sexual penetrations of the victim arose out of the sentencing offense. MCL 777.41(2)(a). However, if multiple sexual penetrations occurred that cannot be described as “arising out of the sentencing offense,” those penetrations must be scored under OV 12 or OV 13. *People v Johnson*, 474 Mich 96, 101-102; 712 NW2d 703 (2006); MCL 777.43(2)(c). Contrary to defendant’s assertion, there is sufficient record evidence that two or more criminal sexual penetrations beyond the sentencing offenses occurred during at least one encounter.

Defendant was convicted of three counts of CSC-III based on oral penetration, digital penetration, and vaginal/penile penetration of the victim. The victim alleged that each of the three times she had sex for money with defendant he subject her to multiple forms of penetration. Specifically, the first time that defendant had sex with the victim all three forms of penetration were performed. Therefore, the trial court could have reasonably concluded that two or more penetrations other than the penetration that was the basis of a sentencing offense took place on that occasion. *People v McLaughlin*, 258 Mich App 635, 676-677; 672 NW2d 860 (2003). Accordingly, the trial court appropriately scored 50 points under OV 11. *Hornsby, supra*.

OV 14, MCL 777.44, was also properly scored at 10 points. OV 14 measures the offender’s role in the crime and requires the sentencing court to assess ten points if, considering

the entire criminal transaction, the offender was a “leader in a multiple offender situation.” MCL 777.44; *People v Apgar*, 264 Mich App 321, 331; 690 NW2d 312 (2004). Although defendant was the only person accused of having sex with the victim, Robinson was implicated throughout the trial as an accomplice to defendant’s crimes. The victim testified that Robinson told defendant that she was willing to have sex with defendant for money on at least two occasions when she did not want to go through with that plan. In her preliminary examination testimony, the victim stated plainly that Robinson “set us up to go to [defendant’s] house to have sex with him.” In light of defendant’s age and his pattern of befriending high school students, as well as Robinson’s status as a special education student, the trial court could have reasonably concluded that defendant was the leader in their sex for money scheme. *Id.* Consequently, the trial court’s scoring of OV 14 is adequately supported by the record. *Hornsby, supra.*

Finally, defendant also argues that the scoring of his offense variables enhanced his sentence based on facts not proved at trial and, therefore, the scoring of those offense variables violated his Sixth Amendment right to a jury trial under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Michigan’s sentencing scheme, however, is not affected by the cited cases. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). “As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Id.* at 164. Consequently, we find no plain error affecting defendant’s substantial rights with respect to the scoring of OV 3, OV 9, or OV 19.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Helene N. White  
/s/ Stephen L. Borrello